UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

VICENTE RODRIGUEZ, JOVITA RODRIGUEZ, and GUADALUPE FRANCO, on behalf of themselves and others similarly situated,

Plaintiffs,

v.

ACL FARMS, INC., KEVIN B. GAY, and WASHINGTON FARM LABOR SOURCE, LLC,

Defendants.

NO. **CV-10-3010-LRS**

ORDER RE MOTIONS FOR PROTECTIVE ORDER AND TO COMPEL, AND BIFURCATING CASE

BEFORE THE COURT are the Plaintiffs' Motion For Protective Order Re: Immigration Status (Ct. Rec. 52) and Defendant Washington Farm Labor Source, LLC's Motion To Compel Discovery Responses (Ct. Rec. 76). These motions were heard with oral argument on November 9, 2010. Andrea Schmitt, Esq., argued for Plaintiffs. Brendan V. Monahan, Esq., argued for Defendants ACL Farms, Inc. and Kevin B. Gay. Jeffrey M. Kreutz, Esq., argued for Defendant Washington Farm Labor Source, LLC (WA-FLS).

I. BACKGROUND

Plaintiffs allege that in 2008, Defendants unlawfully obtained approval for H-2A "guest workers" and denied agricultural employment to Plaintiffs and the

class of workers they represent.[1] Plaintiffs allege Defendant ACL Farms violated the Migrant and Seasonal Agricultural Worker Protection Act (AWPA), 29 U.S.C. §§ 1801-1872, by providing false or misleading information concerning the terms and conditions of employment and by failing to comply with the working arrangement. Plaintiffs allege Defendant WA-FLS violated Washington's Farm Labor Contractors Act (FLCA), RCW Chapter 19.30, by making or causing to be made false, fraudulent or misleading information concerning the terms, conditions or existence of employment at ACL Farms.

II. DISCUSSION

There is no dispute that immigration status is irrelevant to determining Defendants' liability for the alleged violations of the AWPA and the FLCA, and whether Plaintiffs are entitled to statutory damages for any such violations. The issue is whether immigration status is relevant to whether any actual damages should be awarded.

In *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147-49, 122 S.Ct. 1275 (2002), the U.S. Supreme Court concluded that awarding backpay to illegal aliens "for years of work not performed" ran counter to the "comprehensive scheme prohibiting the employment of illegal aliens" enacted by Congress. (Emphasis added). In *Galaviz-Zamora v. Brady Farms, Inc.*, 230 F.R.D. 499 (W.D. Mich. 2005), migrant and seasonal agricultural workers brought a class action against employers under the Fair Labor Standards Act (FLSA) and the AWPA. The district court concluded the plaintiffs' immigration status was not relevant for purposes of standing or damages because the plaintiffs were seeking

[1] An order granting class certification is being entered contemporaneously with this order.

backpay for work already performed. The *Galaviz-Zamora* court relied on *Flores v. Amigon*, 233 F.Supp.2d 462, 463 (E.D.N.Y. 2002), an FLSA case, which distinguished *Hoffman* on the basis that it "did not expressly deal with the circumstances presented here, where the plaintiffs have already performed the work for which unpaid wages were being sought." The *Flores* court observed that policy issues implicated in *Hoffman* are not implicated in circumstances where an employee seeks backpay for work already performed. *Id*. at 464. Thus, while the award of backpay in *Hoffman* was held to be contrary to federal immigration law, compelling employers to pay illegal aliens at the same rate as legal workers for work actually performed, helps eliminate the incentive to employ illegal aliens which is one of the stated goals of federal immigration law. *Id*.

In the captioned matter, what the Plaintiffs would seek as actual damages are wages they would have earned had they been offered and accepted the work that was instead done by H2-A guest workers. The Plaintiffs are not seeking compensation for work already performed. In a March 2008 decision in *Perez-Farias v. Global Horizons, Inc.*, CV-05-3061-RHW. an Eastern District of Washington case involving alleged violations of both the AWPA and the FLCA, the Honorable Robert H. Whaley wrote that "[a]ny class member that seeks to prove damages at a later proceeding will have to show that they are qualified to work. **An illegal alien is not qualified to work under clearance orders**." 2008 WL 833055 at *12 (Emphasis added). Subsequently, in an April 2009 decision in that case, 2009 WL 1011180 at *19, Judge Whaley addressed the fact the plaintiffs were no longer seeking actual damages, but only statutory damages:

> Given that Plaintiffs are no longer seeking actual damages, the Court finds that the Denied Work subclass will not have to show proof of eligibility to work in order to recover statutory damages. The purpose of statutory damages is to compensate, deter and encourage persons to enforce their rights under the statute. Plaintiffs were aggrieved irrespective of their eligibility to work. As such, proof of eligibility to

work is not necessary in order to receive statutory damages. Judge Whaley never explicitly ruled immigration status was irrelevant to collection of actual damages, and his 2008 ruling suggests he would have considered it relevant.

Another Eastern District of Washington case, *Sandoval v. Rizzuti Farms, Ltd.*, CV-07-3076-EFS, involved alleged violations of Washington's Little-Norris LaGuardia Act, RCW 49.32.020. In an April 2009 decision, 2009 WL 959478 at *3, the Honorable Edward F. Shea initially found that immigration status was relevant to backpay claims under RCW 49.32.020 as this is the "state analogue" to the National Labor Relations Act (NLRA) which was at issue in *Hoffman*. He concluded that should the plaintiffs' claims survive summary judgment and the case proceed to trial, the court would "permit limited discovery into Plaintiffs' immigration status because it is relevant to Plaintiffs' backpay claims for work not performed." *Id*. In July 2009, Judge Shea reconsidered his April 2009 decision and reversed course. He noted the distinction between "backpay," that being damages awarded to an employee or ex-employee when an employer unlawfully prevents that individual from working, versus "uncompensated wages" which are already earned wages which have not been collected. 2009 WL 2058145 at *1 at fn. 1. Judge Shea found, however, there was no "practical distinction" between the two because "[b]oth depend on proof of hours that were worked or would have been worked but for the employer's violative conduct." *Id*. at *2.

In the captioned matter, the undersigned questions whether the Plaintiffs could in fact have continued to work or resumed work at ACL Farms but for the alleged violations of the AWPA and the FLCA. This court concludes actual damages must be treated differently than liability and statutory damages. Making immigration status irrelevant to liability and statutory damages seemingly helps eliminate an employer's incentive to employ illegal aliens. The court is not

convinced the same is true with regard to actual damages for work which was not performed. An award of statutory damages serves the purpose of deterring improper employment of H2-A guest workers to the detriment of local workers who can satisfy the employer's labor needs. The primary purpose of the AWPA's statutory awards provisions is promoting compliance by agricultural employers and deterring and correcting exploitative practices that have historically plagued the migrant farm labor market. *Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.3d 1317, 1332 (5th Cir. 1985). The purpose of FLCA's statutory awards provisions is presumably the same. No proof of actual injury is necessary. Actual damages compensate actual injury and represent an additional step beyond liability and statutory damages. Assuming actual damages can be awarded to a plaintiff because he could have continued to work or resumed work at ACL Farms (i.e., he was eligible to work), the next question then is whether that plaintiff reasonably mitigated his damages. It is necessary to consider mitigation on a plaintiff-by-plaintiff basis in order to fairly and accurately determine the amount of actual damages to which a particular plaintiff is entitled.

In *Rivera v. Nibco, Inc.*, 364 F.3d 1057 (9th Cir. 2004), the Ninth Circuit Court of Appeals disagreed with the defendant's position that the Supreme Court's decision in *Hoffman* foreclosed any award of backpay to an undocumented plaintiff, and that discovery of documented or undocumented status was essential to defendant's defense in a Title VII case. The Ninth Circuit thought it "unlikely" that *Hoffman* applied in Title VII cases and noted significant differences between the NLRA (at issue in *Hoffman*) and Title VII. *Id.* at 1067-69. The circuit concluded "the overriding national policy against discrimination would seem likely to outweigh any bar against the payment of back wages to unlawful immigrants in Title VII cases." *Id*. at 1069. *Rivera* did not, however, settle the relevancy of immigration status to an award of actual damages (backpay) for work

not performed. That distinction was not discussed in *Rivera* because it was not necessary to do so:

> We need not decide the *Hoffman* question in this case, however. Regardless whether *Hoffman* applies in Title VII cases, it is clear that it does not *require* a district court to allow the discovery sought here. No backpay award has been authorized in this litigation. Indeed, the plaintiffs have proposed several options for ensuring that, whether or not *Hoffman* applies, no award of backpay is given to any undocumented alien in this proceeding. Thus, the very problem NIBCO has identified may well never arise here.

Id. at 1069.

Furthermore, *Rivera* did not foreclose the possibility that immigration status, although clearly irrelevant to the Title VII liability determination, might not become relevant later in the remedies portion of the litigation. According to the circuit:

> The district court has not yet ruled on the plaintiffs' proposed bifurcated proceedings. Although we do not order such proceedings here, it is clear that a separation between liability and damages would be consistent with our prior case law and would satisfy the concern that causes of action under Title VII not be dismissed, or lost through intimidation, on account of the existence of particular remedies. The principal question to be decided in the action before us is whether NIBCO violated Title VII. It makes no difference to the resolution of that question whether some of the plaintiffs are ineligible for certain forms of statutory relief. NIBCO's contention that discovery regarding the plaintiff's immigration status is essential to its defense is therefore without merit.

Id. at 1070.

The circuit concluded the district court had not erred in determining that it would substantially burden the plaintiffs to allow the defendant to use the discovery process to inquire into their immigration status- " a status that NIBCO had the opportunity to examine upon hiring and this is irrelevant to the question of liability." *Id*. at 1074. (Emphasis added). And the circuit observed that "[i]f the district court decides to bifurcate the proceeding, as the plaintiffs have requested, the availability of backpay remedies for certain plaintiffs will be determined, if at

all, only after the liability phase." *Id*. at 1075.

This court concludes immigration status is relevant to determination of actual damages and does not place an undue burden on those Plaintiffs who elect to pursue such damages. In order to avoid any chilling of Plaintiffs' efforts to pursue liability and statutory damages, however, the court will bifurcate the case so that liability and statutory damages are resolved in the initial phase. As immigration status is irrelevant to those inquiries, there will be no discovery in the initial phase regarding immigration status[2]. The scheduling order already entered by the court (Ct. Rec. 18) will pertain solely to liability and statutory damages.[3] If liability is established, Plaintiffs within the class will have to elect whether to pursue actual damages. Those Plaintiffs who elect to pursue actual damages will be subject to discovery which may reveal their immigration status.

III. CONCLUSION

Pursuant to Fed. R. Civ. P. 42(b), and in order to avoid prejudice to Plaintiffs and to economize the proceedings, the captioned matter is **BIFURCATED** such that liability and statutory damages will be determined in an

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[2] Defendants argue that deferring discovery concerning actual damages (and related issues) will result in a second round of depositions thereby leading to greater costs as well as additional inefficiencies. However, it seems unlikely that extensive deposition practice will be needed in the initial liability phase of the trial given the fact that the employment records of ACL Farms will be a primary source used to identify class action plaintiffs and employment history.

[3] Trial is not scheduled until October 31, 2011, but there is the possibility that liability and statutory damages issues could be resolved short of trial, allowing for prompter commencement of the second phase regarding actual damages.

initial phase already established by the existing scheduling order.[4] Following resolution of liability and statutory damages issues, and if necessary, there will be a secondary phase dedicated to resolution of actual damages issues and a separate scheduling order will be issued with regard thereto.

Plaintiffs' Motion For Protective Order (Ct. Rec. 52) is **GRANTED with regard to the initial phase concerning liability and statutory damages**. There will be no discovery in the initial phase relating to immigration status, including, but not limited to: immigration documents, passports, visas, social security numbers, social security statements, tax identification numbers, I-9 tax forms from any employer, unemployment compensation information, and information about national origin and entry into the United States. Plaintiff's Motion For Protective Order (Ct. Rec. 52) is **DENIED with regard to any secondary phase concerning actual damages**.

The Motion To Compel filed by Defendant WA-FLS (Ct. Rec. 76) is **DENIED** without prejudice to Defendant seeking the subject discovery from Plaintiffs in any secondary actual damages phase of the litigation.

IT IS SO ORDERED. The District Court Executive is directed to forward copies of this order to counsel of record.

DATED this 12th day of November, 2010.

s/Lonny R. Suko

LONNY R. SUKO
Chief United States District Court Judge

[4] Bifurcation can be ordered on the court's own motion. *Saxion v. Titan-C Mfg., Inc.*, 86 F.3d 553, 556 (6th Cir. 1996).